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Bloomingtondale's, Inc. and Fatemeh Johnmohammadi.
Case 31–CA–071281

April 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On June 25, 2013, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The General Counsel, the Charging Party, and the Respondent all filed exceptions and supporting briefs. The General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed a combined answering brief to the other parties' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.²

**I. THE ABSENCE OF A BOARD QUORUM DOES NOT LIMIT
THE AUTHORITY OF THE GENERAL COUNSEL TO**

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The Respondent argues that the complaint is time-barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after Charging Party Fatemeh Johnmohammadi signed and became subject to the arbitration policy at issue in this case. We reject this argument, as did the judge in denying the Respondent's motion for judgment on the pleadings, because the Respondent continued to maintain the arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has consistently held that maintenance of an unlawful workplace rule, such as the Respondent's arbitration policy, constitutes a continuing violation that is not time-barred by Sec. 10(b). See, e.g., *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration policy here, independently violates Sec. 8(a)(1). See *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 19–21 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). The Respondent initiated enforcement of its arbitration policy when it filed its motion to compel arbitration in the Charging Party's class action lawsuit in Federal district court. The motion to compel arbitration was filed on November 30, 2011, well within the statutory 6-month period preceding Johnmohammadi's filing and service of the charge in December 2011.

² We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

**INVESTIGATE AND PROSECUTE ALLEGED VIOLATIONS
OF THE ACT**

On April 30, 2013, the Board issued an order denying the Respondent's motion to dismiss the complaint, in which the Respondent argued that the complaint was void ab initio because the Board lacked a quorum at the time the complaint was issued. 359 NLRB No. 113 (2013). On October 9, 2014, the Respondent filed a motion for reconsideration of the April 30, 2013 order, arguing that the Board lacked a quorum when it ruled on the Respondent's motion to dismiss the complaint. With regard to the merits of the motion to dismiss, the Respondent argues, as it did previously, that the then-Acting General Counsel Lafe Solomon lacked authority to prosecute this case while the Board lacked a quorum. In addition, the Respondent specifically argues for the first time that Regional Director Mori Rubin, who issued the instant complaint, was not validly appointed because the Board lacked a quorum at the time it approved her appointment.³

We grant the Respondent's motion for reconsideration. At the time of the April 30, 2013 order denying the mo-

³ We reject the Respondent's argument that the complaint should be dismissed because the Board lacked a quorum at the time it originally approved Regional Director Rubin's appointment.

First, this argument is procedurally defective because it was not properly raised in the Respondent's exceptions and brief. Prior to filing its motion for reconsideration, the Respondent made no effort to challenge the validity of Regional Director Rubin's appointment directly. Rather, as noted above, the Respondent focused entirely upon its argument that in the absence of a valid Board quorum there was no jurisdiction to prosecute the complaint. Thus, the Respondent's argument was that no Regional Director could prosecute the complaint in the absence of a valid Board quorum, not that Regional Director Rubin could not prosecute the complaint because she was not validly appointed. Further, while the Respondent's exceptions generally questioned the validity of any appointments by the Board during the time it lacked a quorum (exception 49 of 53), the Respondent did not raise this matter with the judge and it did not elaborate on its argument in its brief to the Board. Under Sec. 102.46(b)(2) of the Board's Rules and Regulations, this type of "bare exception" may be disregarded. *Industrial Contractors Skanska, Inc.*, 362 NLRB No. 169, slip op. at 1 fn. 1 (2015); *Earthgrains Co.*, 351 NLRB 733, 733 fn. 1 (2007).

Second, even assuming we were to consider the Respondent's argument regarding Director Rubin's appointment, we would not find it appropriate to dismiss the complaint. In this regard, while the Board lacked a valid quorum on May 15, 2012, when it originally approved the appointment of Regional Director Rubin, on July 18, 2014, the Board ratified all administrative and personnel decisions made from January 4, 2012, to August 5, 2013, and expressly authorized Regional Director Rubin's appointment. Further, on July 30, 2014, Regional Director Rubin ratified all decisions made between her initial appointment and July 18, 2014. See *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 1 fn. 2 (2015); *Pallet Cos.*, 361 NLRB No. 33 (2014), enf. mem. No. 14–1182, 2015 WL 9309133 (D.C. Cir. Dec. 18, 2015) (per curiam). Under these circumstances we find that any alleged defect in Regional Director Rubin's appointment has been cured and there is no basis for dismissing the complaint.

tion to dismiss, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Accordingly, we set aside the April 30, 2013 order and consider de novo the Respondent's Motion to Dismiss.

In support of its original motion to dismiss, the Respondent relied entirely upon its argument that in the absence of a valid Board quorum there was no jurisdiction to prosecute the complaint. We reject this argument. As we stated in *American Electric Power*, 362 NLRB No. 92, slip op. at 1 fn. 1 (2015), “[t]he authority of the General Counsel to investigate unfair labor practice charges, and to issue and prosecute unfair labor practice complaints, is derived directly from the language of the National Labor Relations Act . . . , not from any ‘power delegated’ by the Board. Accordingly, the presence or absence of a valid Board quorum has no bearing on the General Counsel’s prosecutorial authority.” Similarly, with respect to the validly delegated authority of other Board officials, we reject any suggestion that the temporary absence of a Board quorum in any way limits such authority. See *Care One at Madison Avenue, LLC*, 361 NLRB No. 159, slip op. at 1 fn. 2 (2014). Accordingly, we deny the Respondent’s motion to dismiss the complaint.

II. SW GENERAL DOES NOT PRECLUDE LITIGATION OF THIS CASE

In *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), rehearing en banc denied, Nos. 14–1107 & 14–1121, 2016 U.S.App.LEXIS 981 (D.C. Cir. Jan. 20, 2016), the U.S. Court of Appeals for the District of Columbia Circuit held that Acting General Counsel Lafe Solomon was qualified to serve in that capacity under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345, et seq., and that he validly served as the Acting General Counsel at the direction of the President beginning June 21, 2010. The court further held that Solomon’s authority as the Acting General Counsel ceased on January 5, 2011, when the President nominated him for the position of the General Counsel.

Thereafter, on October 22, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case which states, in relevant part,

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a

proper exercise of the General Counsel’s broad and unreviewable discretion under Section 3(d) of the Act.

My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting “the General Counsel of the National Labor Relations Board” from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. (Citation omitted.)

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

On January 27, 2016, the Respondent filed a motion to strike or otherwise nullify this Notice of Ratification, arguing that General Counsel Griffin lacks the authority to ratify the actions taken by former Acting General Counsel Solomon because those actions were void under *SW General*, and that General Counsel Griffin was prohibited from taking prosecutorial actions in this matter by the “separation of functions” provisions of the Administrative Procedure Act (5 U.S.C. § 554). We reject both arguments.⁴

⁴ Notably, neither the Respondent’s motion for reconsideration nor its motion to strike directly argue that the complaint should be dismissed because it was issued at a time when Acting General Counsel Solomon lacked authority under *SW General*. Rather, the motion for reconsideration is focused on the Board’s lack of a quorum at the time the complaint was issued and when the motion to dismiss originally was denied, and the motion to strike is focused on the authority of General Counsel Griffin to ratify the actions taken by former Acting General Counsel Solomon.

On March 11, 2016, the Respondent submitted to the Executive Secretary a letter calling the Board’s attention to what it described as “pertinent and significant new authority” that issued after these two motions. Purporting to act pursuant to the Board’s decision in *Reliant Energy*, 339 NLRB 66 (2003), the Respondent argues that the decision of the Ninth Circuit in *Hooks v. Kitsap Tenant Support Services*, No. 13–35912, 2016 WL 860335 (9th Cir. Mar. 7, 2016) (finding Acting General Counsel Solomon lacked authority to serve after the President submitted his nomination to be the permanent General Counsel to the Senate), supports the arguments it made in support of its motion for reconsideration and motion to strike.

The Respondent misunderstands the Board’s decision in *Reliant Energy*, supra. The purpose of the practice recognized in *Reliant Energy* is to allow a party to bring to the Board’s attention new authority that relates to the issues litigated by the parties and presented to the Board through timely filed exceptions. *Reliant Energy* does not purport to allow a party to circumvent the Board’s Rules and Regulations and raise new issues that were not presented to the judge or preserved for appeal through the filing of timely exceptions. See Sec. 102.46 of the Board’s Rules and Regulations. In this regard, the record shows that the Respondent did not raise any issue regarding the authority of Acting General Counsel Solomon under the FVRA during the investigation, in its motion to dismiss, before the judge, or in its exceptions to the Board.

The Respondent has misstated the holding of *SW General*. In that case the court recognized that the General Counsel of the National Labor Relations Board is one of several officers expressly exempted from the “void-ab-initio” and “no ratification” provisions of the FVRA. 796 F.3d at 78–79, citing 5 U.S.C. § 3348(e)(1). Therefore, the court treated the actions of an improperly serving Acting General Counsel as “voidable, not void,” and indicated that any statutory defect in actions could be cured through ratification by a subsequent, properly appointed General Counsel. *Id.* (discussing 5 U.S.C. § 3348); see also *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *Federal Election Commission v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996).⁵

The Respondent has also misstated the import of the “separation of functions” provisions of the Administrative Procedure Act (5 U.S.C. § 554). Section 554(d) of the APA provides, in relevant part,

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

The plain language of this provision restricts the ability of a person who has served in a prosecutorial role in a particular matter from subsequently serving in an adjudicative role in the same or a factually related matter. That is not what has occurred in this case.

Before being confirmed as General Counsel of the National Labor Relations Board, Richard Griffin first was named as a recess appointee to the National Labor Rela-

tions Board. His recess appointment was challenged, and it ultimately was determined that his appointment as a Board Member was not valid. To the extent relevant to this litigation, his only alleged action as an “adjudicator” was to determine that his recess appointment was valid, that the Board therefore had a quorum, and to deny the Respondent’s motion to dismiss, which was based on the argument that the Board lacked a quorum. 359 NLRB No. 113 (2013). In doing so, Griffin did not take any action as an adjudicator with respect to any matter in which he previously served in a prosecutorial role.

As to the ability of Griffin to act in a prosecutorial role, there is no basis under the APA for disqualifying Griffin from prosecuting this or any other matter. As noted above, Section 554(d) is focused on who can serve as an adjudicator, and disqualifies as an adjudicator anyone who has previously served in the performance of investigative or prosecuting functions in the same or a factually related case. There is no similar language addressing who may serve in a prosecutorial role.

For the foregoing reasons, we deny the Respondent’s motion to strike or otherwise nullify this Notice of Ratification. Furthermore, assuming arguendo that the Respondent had timely raised the FVRA (see fn. 4, *supra*), in view of the independent decision of General Counsel Griffin to continue prosecution of this matter, we reject as moot any challenge to the authority of Acting General Solomon under the FVRA.

III. THE 8(A)(1) WAIVER OF CLASS AND COLLECTIVE ACTIONS IN ALL FORUMS

The judge found that the Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing the mandatory individual arbitration procedure set forth in its Solutions InSTORE Early Dispute Resolution program (SIS program)⁶ because the SIS program’s opt-out procedure placed it outside the scope of the Board’s holding in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied* in relevant part, 737 F.3d 344 (5th Cir. 2013); reaffirmed in *Murphy Oil*, *supra*, which held that an employer violates Section 8(a)(1) of the Act when it requires employees, as a condition of their employment, to enter into an agreement “that precludes them from filing

⁵ The Respondent’s first reference to the *Kitsap* litigation was a passing reference to the underlying district court decision, which it cited in support of its “lack of quorum” argument. See Respondent’s motion for reconsideration, p. 5 (citing *Hooks ex rel. NLRB v. Kitsap Tenant Support Services*, No. C13–5470 BHS, 2013 US.Dist.LEXIS 114320 (W.D. Wash. Aug. 13, 2013)). Under these circumstances, we find that the Respondent has waived its right to challenge the authority of Acting General Counsel Solomon under the FVRA, and we reject the Respondent’s March 11, 2016 letter as an untimely effort to file additional exceptions. See *Boeing Co.*, 362 NLRB No. 195, slip op. at 1 fn. 1 (2015).

⁶ Although the court in *SW General* also found that the subsequent final Board order “did not ratify or otherwise render harmless the FVRA defect in the ULP complaint,” it did so because, given the scope of prosecutorial discretion of the General Counsel under the Act, it could not be confident that the complaint against Southwest would have been issued by a different General Counsel. 796 F.3d at 80–81. In the instant matter there is no similar uncertainty—the issuance of the complaint and its continued prosecution were expressly ratified by General Counsel Griffin, a subsequent, properly appointed General Counsel.

⁶ The plan document setting forth the SIS program provides that “[t]he Arbitrator shall not consolidate claims of different Associates [i.e., employees] into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group).” The first clause clearly precludes joinder of claims, and the definition of “class action” is broadly worded so as to make clear that the second clause prohibits all forms of concerted arbitration and not just class-action arbitration properly so called. In short, the SIS program rules out all but individual arbitration.

joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.” *Id.* at 2277. After the judge issued his decision, the Board, rejecting the rationale relied upon by the judge here, held in *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015), that “an agreement that limits resolution of all employment-related claims to individual arbitration, unless employees follow a procedure to opt out of the agreement,” imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton*, supra, and *Murphy Oil*, supra. The Board further held in *On Assignment Staffing Services*, supra, slip op. at 1, 5–8, that even if we were to assume that an opt-out provision renders an arbitration policy not a condition of employment, and therefore voluntarily entered into, an arbitration policy that precludes employees from pursuing protected concerted legal activity in all forums is unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity.⁷ Accordingly, we reverse the judge’s dismissal of these allegations and find that the Respondent violated Section 8(a)(1) by maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.⁸

⁷ The dissent asserts that “[t]he class-action waiver agreements were entered into voluntarily, even though the Respondent was willing to hire employees only if they entered into the agreements.” This assertion does not withstand scrutiny. Under established law in *Horton* and the many cases following it, the material question is whether the employees were required to sign the waiver agreements “as a condition of their employment.” *D. R. Horton*, supra, 357 NLRB at 2277. By the dissent’s own admission, they were. Moreover, employees who sign the agreements after being told that, if they don’t sign, they can look elsewhere for a job, can hardly be said to have signed “voluntarily.”

⁸ The Respondent argues that its arbitration policy includes an exemption allowing employees to file charges with administrative agencies, including the Board, and thus does not, as in *D. R. Horton*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013) (stating, in dicta, that the arbitration agreement at issue there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees). We reject this argument for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed two postbrief letters drawing attention to the fact that the United States Court of Appeals for the Ninth Circuit, affirming the decision of the Federal district court, concluded that the enforcement of the SIS program against the Charging Party did not violate the National Labor Relations Act. See *Johnmohammadi v. Bloomingdale’s*, 755 F.3d 1072 (9th Cir. 2014). As explained above, we respectfully disagree with the court’s conclusion. In its exceptions, the Respondent contends that the lower court’s unreversed decision is binding on the Board “under the

IV. THE 8(A)(1) PROHIBITION AGAINST FILING NLRB CHARGES

doctrines of res judicata or collateral estoppel.” In its supporting brief, however, the Respondent failed to present any argument in support of this exception. Accordingly, we disregard the exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enf’d. 456 F.3d 265 (1st Cir. 2006). Even if we were to consider it, we would reject it as unmeritorious. “The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” *Field Bridge Associates*, 306 NLRB 322, 322 (1992), enf’d. 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993).

Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, we shall order the Respondent to reimburse Fatemeh Johnmohammadi and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent’s unlawful motion to compel arbitration. See *Bill Johnson’s Restaurants v. NLRB*, 461 NLRB 731, 747 (1983) (“If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys’ fees and other expenses” as well as “any other proper relief that would effectuate the policies of the Act.”). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) (“[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses.”), enf’d. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). Because the lawsuit has been dismissed, we find it unnecessary to order the Respondent—as in *Murphy Oil*, supra, slip op. at 21–22—to remedy its enforcement violation by notifying the court that it no longer opposes the lawsuit on the basis of its unlawful arbitration policy.

The dissent observes that the Act “creates no substantive right for employees to insist on class-type treatment of non-NLRA claims.” This is correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what the dissent ignores is that the Act does “create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondent’s arbitration policy is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to the dissent’s argument that finding the arbitration policy unlawful runs afoul of employees’ Sec. 7 right to “refrain from” engaging in protected activity. See *Murphy Oil*, supra, slip op. at 18; *Bristol Farms*, supra, slip op. at 2. Nor is the dissent correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

We also reject our dissenting colleague’s view that the Respondent’s motion to compel arbitration was protected by the First Amendment’s Petition Clause. In *Bill Johnson’s Restaurants v. NLRB*, supra, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a state court’s jurisdiction because of Federal preemption, and where “a suit . . . has an objective that is illegal under federal law.” 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent’s motion that have the illegal objective of limiting employees’ Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

As more fully explained in the judge's decision, the Respondent informs employees of its SIS arbitration program by providing them with three separate documents. The most comprehensive is a 17-page plan document that sets out four steps of the program. The fourth step specifies a litany of employment disputes that are covered by the arbitration program, followed by a paragraph containing a statement that "claims . . . under the National Labor Relations Act are . . . not subject to Arbitration under Step 4."

Employees also are given a 12-page brochure summarizing the arbitral steps of the plan document, and an acknowledgment form stating that they have received the plan document and summary brochure. Neither the summary brochure nor the acknowledgment form states that NLRA claims are not subject to mandatory arbitration.

The judge found that the conflict between the plan document and the summary brochures and acknowledgment form "creates an ambiguity that could reasonably lead employees to believe that they did not have a right to file charges with the Board." We agree, and affirm the judge's 8(a)(1) finding on the basis of the inconsistency among the various documents, in accord with our decisions in *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2 (2016), and *Amex Card Services Co.*, 363 NLRB No. 40, slip op. at 2-3 (2015).⁹

We further find that even considering the SIS plan document in isolation, it violates Section 8(a)(1) of the Act because employees reasonably would be confused as to whether they could file Board charges. In this regard, the plan document broadly provides on page 5 that "[a]ssociates agree, as a condition of employment, to arbitrate any and all disputes, including statutory and other claims, not resolved at Step 3." This requirement is repeated two more times on page 6 with provisions stating that "all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, . . . or statutory law, . . . shall be settled exclusively by final and binding arbitration," and that "[a]ssociates agree, as a condition of employment, to arbitrate any and all disputes, including statutory and other claims" and "[a]ll unasserted employment-related claims as of January 1, 2007 arising under federal . . . statutory or common law, shall be subject to arbitration." In the context of these broad and repeated pronouncements is the unexplained phrase that "[c]laims . . . under

the National Labor Relations Act are . . . not subject to Arbitration at Step 4."¹⁰

We find this phrase is insufficiently clear to ensure that employees with no legal training understand that they retain the right to file an unfair labor practice charge with the Board and that they can do so with or on behalf of other employees. See *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at 1 fn. 2 (2016); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4-6 (2015); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); see also *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."); *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) (finding facially overbroad no-distribution rule with an exception for "matter the distribution of which is protected by Section 7 of the National Labor Relations Act" unlawful, explaining that "it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act").

Contrary to our colleague, we cannot agree that the single phrase referencing NLRA claims as exempt from arbitration makes clear to employees that they may file charges with the Board. The all-encompassing preceding language, emphasizing that "all employment-related legal disputes" are to be resolved by arbitration, including those arising under "federal" law, could reasonably be understood by employees to encompass unfair labor practice charges. Viewed in this context, we find that employees would not reasonably understand the exclusion of "[c]laims . . . under the National Labor Relations Act" to refer specifically to their unobstructed right to

⁹ In affirming the judge's finding, we do not rely on *Supply Technologies, LLC*, 359 NLRB No. 38 (2012).

¹⁰ The full relevant paragraph in the SIS plan document reads as follows: "Claims by Associates that are required to be processed under a different procedure pursuant to the terms of an employee pension or benefit plan shall not be subject to arbitration. Claims by Associates for state employment insurance (e.g., unemployment compensation, workers' compensation, worker disability compensation) or under the National Labor Relations Act shall not be subject to Arbitration under Step 4. Statutory or common law claims made outside of the state employment insurance system alleging that the Company retaliated or discriminated against an Associate for filing a state employment insurance claim, however, shall be subject to arbitration." The reference to claims under the National Labor Relations Act is buried within a welter of other exclusions many employees would find difficult to understand.

file unfair labor practice charges with the National Labor Relations Board.¹¹

ORDER

The National Labor Relations Board orders that the Respondent, Bloomingdale's, Inc., Sherman Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) In the manner set forth in this decision, reimburse Fatemeh Johnmohammadi and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to compel individual arbitration.

(d) Within 14 days after service by the Region, post at its Sherman Oaks, California facility copies of the attached notice marked "Appendix A," and post copies of the attached notice marked "Appendix B" at all other facilities where the unlawful arbitration policy is current-

ly in effect or has been in effect at any time since June 23, 2011.¹² Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all former employees employed by the Respondent at its Sherman Oaks, California facility at any time since June 23, 2011. If the Respondent has gone out of business or closed any other facility or facilities where it maintained the unlawful arbitration policy at any time since June 23, 2011, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all former employees employed by the Respondent at that facility or those facilities at any time since June 23, 2011.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹¹ Indeed, our colleague's opinion acknowledges that employees may not be familiar with that terminology. For the reasons stated above, we disagree with his conclusion that the SIS program does not unlawfully interfere with employees' right to file unfair labor practice charges with the Board. We note that our colleague repeats an argument previously made, that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims if the agreement reserves to employees the right to file charges with the Board. As explained in *Ralphs Grocery*, 363 NLRB No. 128, slip op. at 3, that argument is at odds with well-established Board law.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Solutions InSTORE Early Dispute Resolution program (SIS program) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the SIS program waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Fatemeh Johnmohammadi was informed of the SIS program, did not exercise her right to opt out, and later filed a state court class action lawsuit against the Respondent alleging violations of wage-and-hour laws, which the Respondent removed to Federal district court. In reliance on the SIS program, the Respondent filed a motion to compel individual arbitration. The district court granted the Respondent's motion, and the Ninth Circuit subsequently affirmed.¹ My colleagues find that the Respondent thereby unlawfully enforced the SIS program. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*² However, I concur with my colleagues' finding that the SIS program—specifically, one component of that program, the “Solutions InSTORE New Hire Acknowledgement”—violates Section 8(a)(1) by interfering with the right of employees to file unfair labor practice charges with the Board.

1. The class-action waiver is lawful, and so was the Respondent's motion to compel arbitration

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.³ However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board ma-

jority's finding in *On Assignment Staffing Services*,⁴ that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”⁵ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁶ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁷ (iii) en-

⁴ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

⁵ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁶ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (“The use of class action procedures . . . is not a substantive right.”) (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

⁷ The Fifth Circuit has consistently denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F.Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration

¹ *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014).

² 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

³ I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

forcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);⁸ and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee’s 9(a) right to present and adjust grievances on an “individual” basis and each employee’s Section 7 right to “refrain from” engaging in protected concerted activities.⁹ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.¹⁰

of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

⁸ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson’s dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

⁹ The class-action waiver agreements were entered into voluntarily, even though the Respondent was willing to hire employees only if they entered into the agreements. Every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is nonmandatory, it is still unenforceable. See *On Assignment Staffing Services*, above (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt in before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). I disagree with my colleagues’ position on class-waiver agreements, but their position is even less defensible when they find that NLRA “protection” operates in reverse—not to protect employees’ rights to engage or refrain from engaging in certain kinds of collective action, but to divest employees of those rights by denying them the right to choose whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

¹⁰ Because I disagree with the Board’s decisions in *Murphy Oil*, above and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), *enf. denied* in relevant part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they “leave[] open a judicial forum for class and collective claims,” *D. R. Horton*, above at 2286, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

Because I believe the Respondent’s SIS program was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in Federal district court seeking to enforce the SIS program.¹¹ It is relevant that the district court that had jurisdiction over the non-NLRA claims *granted* the Respondent’s motion to compel arbitration and that the Ninth Circuit affirmed the lower court’s decision. *Johnmohammadi v. Bloomingtondale’s*, above. That the Respondent’s motion was reasonably based is also supported by other court decisions that have enforced similar agreements.¹² As the Fifth Circuit recently observed after rejecting (for the second time) the Board’s position regarding the legality of class-waiver agreements: “[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an ‘illegal objective’ in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.”¹³ I also believe that any Board finding of a violation based on the Respondent’s meritorious federal court motion to compel arbitration would improperly risk infringing on the Respondent’s rights under the First Amendment’s Petition Clause. See *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and any other plaintiffs for their attorneys’ fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. The “acknowledgment form” component of the SIS program interferes with NLRB charge filing

The SIS program comprises four steps: (i) “open door,” where employees are encouraged to discuss their situation with their supervisor or another member of local management; (ii) review by a divisional senior human

¹¹ As I explain below, I find that one aspect of the SIS program unlawfully interferes with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the SIS program in this regard is not material to the merits of the Respondent’s motion to compel individual arbitration of the Charging Party’s non-NLRA claims. See *Fuji Food Products*, 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

¹² See, e.g., *Murphy Oil USA v. NLRB*, above; *D. R. Horton v. NLRB*, above; *Owen v. Bristol Care*, above; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

¹³ *Murphy Oil USA v. NLRB*, 808 F.3d at 1021.

resources manager; (iii) “request for reconsideration,” where employees can choose to have their dispute reviewed by either a peer panel or the Solutions InSTORE office; and (iv) arbitration, which employees are free to opt out of. The SIS program is set forth in three interrelated documents distributed to new hires in a single packet: an SIS plan document, a summary brochure, and an acknowledgment form. For the following reasons, I do not believe the SIS plan document or the summary brochure unlawfully interferes with employees’ right to file unfair labor practice charges with the Board, but the acknowledgment form does.

(a) The SIS plan document and the summary brochure

Article 2 of the plan document is headed “Claims Subject to or Excluded from Arbitration,” and the first sentence of article 2 states: “*Except as otherwise limited*, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law (‘Employment-Related Claims’), shall be settled exclusively by final and binding arbitration” (emphasis added). Thus, although the term “Employment-Related Claims” is broadly defined in terms that would encompass claims arising under the NLRA, the heading of article 2 announces that some claims are excluded from arbitration, and the phrase “[e]xcept as otherwise limited” qualifies the broad definition of “Employment-Related Claims” so as to make clear that it is subject to one or more exceptions. The plan document then unequivocally informs employees that “[c]laims . . . under the National Labor Relations Act shall not be subject to arbitration.” For the reasons stated in my separate opinion in *Rose Group d/b/a Applebee’s Restaurant*,¹⁴ I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself. Necessarily, then, an arbitration agreement that altogether excludes NLRA claims from its scope cannot reasonably be found to interfere with employees’ right to file charges with the Board.

My colleagues find that the SIS plan document unlawfully interferes with NLRB charge filing notwithstanding its express exclusion of NLRA claims because the exclusion of “[c]laims . . . under the National Labor Relations

Act” is “insufficiently clear to ensure that employees with no legal training understand that they retain the right to file an unfair labor practice charge with the Board and that they can do so with or on behalf of other employees.” I disagree. The plan document unambiguously excludes NLRA claims by making express reference to the statute itself. To the extent that some employees may be unfamiliar with *the statute*, this does not provide reasonable support for a finding that the *plan document* is “insufficiently clear” as to the exclusion of NLRA claims. As the Fifth Circuit stated in *Murphy Oil USA, Inc. v. NLRB*, above, “it would be unreasonable for an employee to construe the [plan document] as prohibiting the filing of Board charges when [it] says the opposite.”¹⁵

¹⁵ 808 F.3d at 1020. Even assuming arguendo that some employees may be unfamiliar with the concept of “[c]laims . . . under the National Labor Relations Act,” this is not materially different from many concepts expressed in collective-bargaining agreements that are routinely deemed enforceable by the Board and the courts, even if they are expressed in “general and flexible terms,” Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959), or are based on practices that may be “unknown, except in hazy form, even to the negotiators,” *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–581 (1960). Although the SIS Plan Document expressly excludes all “[c]laims . . . under the National Labor Relations Act” without stating that employees retain the right to file charges with the NLRB, I believe this is a distinction without a difference. The exclusion of all NLRA claims from the Plan Document’s scope precludes a finding that the Plan Document interferes with NLRB charge filing, since a charge filed with the NLRB is the very means by which “[c]laims . . . under the National Labor Relations Act” are initiated. Where an agreement does not encompass NLRA claims, I believe it is unreasonable for the Board to require an affirmative statement that employees retain the right to file a charge with the NLRB.

In support of their position, my colleagues cite cases where the Board applied the sound principle that an otherwise illegal rule will not be rendered lawful based on language that would predictably be understood only by someone with specialized legal knowledge. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (arbitration agreement reasonably encompassing NLRA claims, with no exception for charge filing, not saved by provision in separate document stating arbitration process “limited to disputes . . . that a court would be authorized to entertain”; among other things, language insufficient to alert nonlawyer employees of remote possibility that NLRB charges were thereby exempted), *enfd. mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007); *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) (facially overbroad distribution rule not saved by disclaimer that “[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law”); *McDonnell Douglas Corp.*, 240 NLRB 794 (1979) (facially overbroad no-distribution rule unlawful despite an exception for distribution “protected by Section 7 of the National Labor Relations Act”; employee would need to know what distribution Section 7 protects to understand what the exception allows). Unlike the general disclaimers in these cases, which would have no meaning to employees (or anyone else) not versed in labor law, every employee who reads English would understand that “[c]laims . . . under the National Labor Relations Act” are not covered by the SIS Plan Document—and therefore that the Plan Document cannot possibly limit his or her right to initiate an NLRA claim by filing a charge with the

¹⁴ 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, dissenting in part). See also *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 6–8 (2016) (Member Miscimarra, concurring in part and dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

My colleagues' contention that the SIS plan document is "insufficiently clear to ensure that employees with no legal training understand that they retain the right to file an unfair labor practice charge with the Board *and that they can do so with or on behalf of other employees*" (emphasis added), together with their citation to *SolarCity*, above, refers to and incorporates a three-stage argument set forth more fully in the majority opinion in *SolarCity*.¹⁶ Adapted to the language of the SIS plan document, the argument goes like this: (i) the plan document states that "[t]he Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action," (ii) an NLRB charge sometimes can be filed "with or on behalf of other employees," and (iii) entering into an agreement under which the arbitrator cannot consolidate the claims of two or more employees would interfere with the right to file Board charges "with or on behalf of other employees," and specialized legal knowledge is required to understand that NLRB charge filing—including filing charges with or on behalf of other employees—cannot lawfully be prohibited. The problem with this argument is its false, circular premise that the language in the SIS plan document stating that "[t]he Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action" can be reasonably construed to interfere with the filing of Board charges, despite the plan document's express exclusion of "[c]laims . . . under the National Labor Relations Act," which contradicts such a construction.¹⁷ In this respect, I believe my colleagues turn precedent upside down. Any reasonable interpretation of the plan document reveals that it has no impact on NLRB charge filing, since the plan document excludes all "[c]laims . . . under the National Labor Relations Act"; and my colleagues—though armed with good intentions—devise an implausible interpretation that, in my view, could only be advocated or adopted by lawyers.

NLRB. See also my separate opinion in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

¹⁶ See 363 NLRB No. 83, slip op. at 6. My colleagues did not expressly separate their analysis into three stages. However, I believe it is difficult to understand the analysis without breaking it into its component parts, and it consists of the three elements set forth in the text.

¹⁷ I believe the SIS Plan Document is sufficiently clear that the only disputes an employee agrees to bring as an individual are those subject to arbitration under the Plan Document, which expressly excludes "[c]laims . . . under the National Labor Relations Act." Therefore, contrary to my colleagues, I do not believe one can reasonably interpret this language as interfering with the right to file NLRB charges (the only way in which "[c]laims . . . under the National Labor Relations Act" are initiated) "with or on behalf of other employees."

Nor do I believe that the Respondent's summary brochure interferes with the right to file Board charges. On the one hand, the summary brochure does broadly state that when covered by the SIS program, "you and the Company agree to use arbitration as the sole and exclusive means to resolving [sic] any dispute regarding your employment," and the summary brochure does not repeat the language contained in the plan document stating that "[c]laims . . . under the National Labor Relations Act shall not be subject to arbitration." However, the summary brochure clearly states: "More specific details are in the program's plan document, which is included here. You should read it."¹⁸ It reiterates these messages—highlighted in red—on the next page, stating: "This booklet is a summary of some of the provisions, benefits, and limitations of the Solutions InSTORE program. You are directed to read the plan document for the actual details." I believe the summary brochure constitutes a type of summary description that is familiar in the employment setting.¹⁹ The Board has never held that a lawful employment-related program or agreement becomes unlawful whenever a party provides a less formal oral or written summary that fails to repeat or reproduce each and every provision that might affect some NLRA-related right or obligation. The importance and complexity of the SIS program warrant the detailed treatment set forth in the plan document, and I believe it is lawful for the Respondent to utilize a summary document that clearly identifies itself as "a summary of some of the provisions, benefits, and limitations of the Solutions InSTORE program," states that "[m]ore specific details" and "the actual details" of the SIS program are contained in the plan document, and urges and directs employees to read the plan document.²⁰

(b) The acknowledgment form

The third and final component of the SIS program is the Respondent's "Solutions InSTORE New Hire Acknowledgement," which reads in relevant part as follows:

¹⁸ When the SIS program was first rolled out, the Plan Document was mailed to employees' homes, not handed to employees in a packet including the Plan document, summary brochure and acknowledgment form—so the summary brochure distributed at that time omitted the phrase "which is included here." Thus, the introductory version of the summary brochure stated: "More specific details are in the program's Plan Document. You should read it." These statements were followed by information regarding four different ways a copy of the Plan Document could be obtained (in addition to receiving it when mailed).

¹⁹ For example, summary plan descriptions, which are short-form descriptions of more detailed benefit plan documents, are required under the Employee Retirement Income Security Act (ERISA).

²⁰ See *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6 (Member Miscimarra, concurring in part and dissenting in part).

Solutions InSTORE New Hire Acknowledgement

I have received a copy of the Solutions InSTORE brochure and Plan Document and acknowledge that I have been instructed to review this material carefully. . . .

I understand that I am covered by and have agreed to use all 4 steps of Solutions InSTORE automatically by my taking or continuing a job in any part of Macy's, Inc.

This means that if at any time I have a dispute or claim relating to my employment, it will be resolved using the Solutions InSTORE process described in the brochure and Plan Document. The process continues to apply to such employment-related disputes even after my employment ends. The Solutions InSTORE process includes Step 4, Arbitration, where disputes are resolved by a professional not affiliated with Macy's, Inc. in an arbitration proceeding, instead of by a judge or jury in a court proceeding. I can read all about Solutions InSTORE, including the benefits and tradeoffs of Step 4, in the brochure and Plan Document. Questions or comments about the program can be directed to my Human Resources Representative or the Office of Solutions InSTORE.

The Respondent's acknowledgment form is materially indistinguishable from the acknowledgment form I found to interfere with Board charge filing in *GameStop Corp.*, above. In *GameStop*, the document that paralleled the Respondent's plan document in this case was called, "the GameStop C.A.R.E.S. Rules for Dispute Resolution," or "Rules." Instead of simply stating that the employee agreed to the Rules, the acknowledgment form in *GameStop* set forth an independent one-sentence agreement stating, without qualification: "I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court." Similarly here, the Respondent's acknowledgment form states that "I understand that I . . . have agreed to use all 4 steps of Solutions InSTORE," and "[t]his means that if at any time I have a dispute or claim relating to my employment, it will be resolved using the Solutions InSTORE process described in the brochure and Plan Document." Moreover, and also like the acknowledgment form in *GameStop*, although the Respondent's acknowledgment form references the plan document, it contains no language indicating that under the more detailed provisions of the plan document, *some* "dispute[s] or claim[s] relating to my employment"—including claims under the National Labor Relations Act—are *not* subject to step 4 of the SIS program (arbitration) and will

not be "resolved using the Solutions InSTORE process." Accordingly, for the reasons set forth in my opinion in *GameStop*, I find that the acknowledgment form in the instant case unlawfully interferes with NLRB charge filing in violation of Section 8(a)(1).²¹

Accordingly, I respectfully dissent in part from my colleagues' decision, and I concur in part with other aspects of their decision.²²

Dated, Washington, D.C. April 29, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

²¹ I recognize that a different interpretation is possible, under which the language stating that the employee has agreed that any "dispute or claim relating to my employment . . . will be resolved using the Solutions InSTORE process described in the brochure and Plan Document" expressly permits filing charges with the NLRB because the Plan Document *excludes* "[c]laims . . . under the National Labor Relations Act" from arbitration (emphasis added). However, this way of viewing the acknowledgment form's language gives a strained interpretation to the phrase "resolved using." It suggests that having a "dispute or claim relating to my employment . . . resolved using the Solutions InSTORE process" actually means that some disputes may be resolved using *the Board's* processes following the filing of an unfair labor practice charge. If a dispute or claim ends up being resolved by the NLRB rather than through arbitration, one would not normally regard the dispute or claim as having been "resolved *using* the Solutions InSTORE process."

The purpose of an acknowledgment form is (as its name indicates) to acknowledge that other, more detailed source documents have been received, and I am not suggesting—nor do I believe one can reasonably expect—that an acknowledgment form should reproduce all of the source documents' definitions, qualifications and exclusions. However, when an acknowledgment form is reasonably interpreted to provide that *all* employment-related disputes must be resolved through arbitration and *only* through arbitration, I believe such a form unlawfully interferes with employees' charge-filing rights. Elsewhere, I suggested several ways in which an employer that wishes to use an acknowledgment form as a component of its arbitration program in tandem with a more complex and detailed source document could avoid the risk of violating the Act. See *GameStop Corp.*, above, slip op. at 7 fn. 21 (Member Miscimarra, concurring in part and dissenting in part).

²² I agree with my colleagues that the complaint is not time-barred under Sec. 10(b) of the Act. I also join my colleagues in granting the Respondent's motion for reconsideration, setting aside the order dated April 30, 2013, and denying the Respondent's motion to dismiss the complaint. I further join my colleagues in denying the Respondent's motion to strike or otherwise nullify the General Counsel's Notice of Ratification.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

WE WILL reimburse Fatemeh Johnmohammadi and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to compel individual arbitration, plus interest compounded daily.

BLOOMINGDALE'S, INC.

The Board's decision can be found at <http://www.nlr.gov/case/31-CA-071281> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

BLOOMINGDALE'S, INC.

The Board's decision can be found at <http://www.nlr.gov/case/31-CA-071281> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Michelle Scannell, Esq., for the Acting General Counsel.
David S. Bradshaw, Esq. (Jackson Lewis, LLP) and *David E. Martin, Esq. (Macy's, Inc.)*, for the Respondent Company.
Dennis F. Moss, Esq., for Charging Party Johnmohammadi.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), petition for review filed No. 12-60031 (5th Cir. Jan. 13, 2012). The Board in that case found that D. R. Horton violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by requiring its employees, as a condition of employment, to sign an "agreement" that any and all future employment claims against the company would be determined on an individual basis by final and binding arbitration. The Board held that the mandatory arbitration "agreement" was unlawful for two reasons: (1) it did not contain an exception for unfair labor practice allegations, and thus would reasonably lead employees to believe that they could not file charges with the Board; and (2) it required employees to waive their substantive right under the NLRA to pursue concerted (i.e., classwide or collective) legal action in any forum, arbitral or judicial.

The issue in this case is whether Bloomingdale's likewise violated the NLRA, even though (1) the plan documents governing its mandatory arbitration procedure—step 4 of its so-called Solutions InStore (SIS) early dispute resolution program—explicitly excludes claims under the NLRA, but the exclusion is not mentioned in the brochures or booklets summarizing the plan; and (2) employees are provided an opportunity to affirmatively opt out of the arbitration provisions within a prescribed period after they are hired and/or notified of the plan, thereby forfeiting the ability to arbitrate any future claims, but retaining the right to pursue them in court on either an individual or a classwide/collective basis.

The case arises from a wage and hour dispute between Bloomingdale's and Fatemeh Johnmohammadi, a former sales

associate at its Sherman Oaks, California store from November 2005 to November 2010. In July 2011, several months after she was terminated, Johnmohammadi filed a class action suit against the Company in State court seeking to recover unpaid overtime and other wages under the State labor code. The Company responded by, first, removing the case to Federal district court under the 2005 Class Action Fairness Act, and, second, filing a motion with the district court on November 30, 2011 to stay the proceeding and compel arbitration. In support of the latter, the Company argued that Johnmohammadi had voluntarily agreed, by failing to opt out of the SIS arbitration provisions within the prescribed 30 days after she was hired, to resolve any future employment disputes through final and binding arbitration on an individual basis, and had thereby explicitly waived both the right to sue in court and the right to bring class claims on behalf of other employees.

Johnmohammadi opposed the Company's motion to compel arbitration. Moreover, on December 12, 2011, she filed an unfair labor practice charge with the Board's Regional Office alleging that, by invoking the SIS class action ban in the court case, the Company was unlawfully interfering with the right of employees to engage in protected concerted activities.

After considering the parties' briefs and oral arguments, by order dated February 29, 2012, the district court granted the Company's motion to compel arbitration and dismissed Johnmohammadi's suit without prejudice. However, Johnmohammadi subsequently filed an appeal with the Ninth Circuit (No. 12-55578), which remains pending. Further, on October 31, 2012, the Regional Director found merit in Johnmohammadi's unfair labor practice charge and issued a complaint against the Company. The complaint alleges that the Company has violated Section 8(a)(1) of the NLRA by maintaining and enforcing the SIS mandatory arbitration program, both because the summary descriptions of the program could lead employees to reasonably believe they are prohibited or restricted from filing unfair labor practice charges with the Board, and because the program requires employees to forgo the right to pursue their employment claims on a collective or classwide basis.

Following two pretrial conferences, a hearing on the complaint was held before me on April 2 in Los Angeles, California. The parties thereafter filed their briefs on May 7. After considering the briefs and the entire record, I find as follows.¹

FINDINGS OF FACT

The SIS dispute resolution program was first implemented by Bloomingdale's and other stores owned by Federated Department Stores (now Macy's) effective January 2004. The governing rules and procedures are set forth in two plan documents. The first is the original 2004 plan document, which applied when Johnmohammadi was hired in 2005. The second is a subsequent 2007 SIS plan document, which applies to employees of Bloomingdale's and other Macy's divisions, subsid-

¹ Commerce jurisdiction under Sec. 2(2), (6), and (7) of the Act is undisputed and well established. Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited.

aries, or related entities who were hired on or after January 1, 2007, as well as former employees of another company (May Department Stores) and its affiliates who became such employees pursuant to an August 30, 2005 merger (R. Exhs. 1, 2; Tr. 82).

As set forth in both plans (which are materially the same), the SIS program contains four steps. The first three steps are internal reviews by supervisors, managers, or, in some cases, peers. These steps are available to any and all employees for any and all employment-related disputes, with the exception of the third step which applies only to employment disputes involving legally protected rights.

As indicated above, the fourth and last step is final and binding individual arbitration. All employees (unless covered by a collective-bargaining agreement) also have access to this step; indeed, they have no other option if they are dissatisfied with the outcome of the third step. That is, the dissatisfied employee's only option is to take the legal claim before a neutral arbitrator,² who under the terms of the program may hear the case only on an individual basis, i.e., may not consolidate claims by more than one employee or hear "class actions."

However, there is an exception for employees who had previously opted out of the SIS arbitration provisions, i.e. had elected not to be covered by the arbitration provisions by executing and mailing a form to the Company's SIS office in Ohio within the prescribed time period. Claims by such an employee may not be submitted to arbitration after the third step; however, the employee is free to continue pursuing the claims in a judicial forum on either an individual or collective/class basis.

In addition, unlike the first three steps, certain types of legal claims are specifically excluded from this step. Thus, the plan documents state that claims required to be processed under a different procedure pursuant to the terms of employee pension or benefit plans, and claims for State employment insurance (e.g. unemployment compensation, workers' compensation, and worker disability compensation) or under the National Labor Relations Act are not subject to arbitration. The plan documents also state that nothing in the SIS program prohibits an employee from filing a charge or complaint with a government agency such as the EEOC, but upon receipt of a right to sue letter or similar administrative determination, the employee's claim becomes subject to arbitration.

Employees have received different notice and opportunities to opt out of the step 4 arbitration provisions depending on whether they were current employees or new hires. Employees who were already employed by Bloomingdale's or other Federated stores at the time of the initial rollout in late 2003 were notified and provided an opportunity to opt out of arbitration twice, once when the program was announced and again a year later. Former employees of May Department Stores who became employees of Bloomingdales or other Federated stores as a result of the August 2005 merger likewise received two such notices and opportunities to opt out. However, new hires such as Johnmohammadi were/are given only one notice and oppor-

tunity to opt out within 30 days of hire.

The manner in which employees have been notified of the SIS program and/or the arbitration provisions has also differed somewhat. During the initial rollout by Federated in late 2003, employees of Bloomingdale's were given a brief letter from Federated's CEO introducing the "important new benefit." This was accompanied by a 12-page brochure, which summarized the program and referred employees to the SIS plan document, "which governs Plan administration," for "more specific details." Employees were also shown a short video about the SIS program (which included a supportive statement by a retired Federal circuit court judge), and a poster was also displayed at each store summarizing the program. Finally, the SIS plan document itself was mailed to each employee's home, along with an "election" form that employees had to complete and mail to the SIS office, postmarked no later than October 31, 2003, in order to opt out of the arbitration provisions, i.e. to elect "not to be covered by the benefits of Arbitration." (R. Exh. 3; Tr. 94-100.)³

A year later, a second mailing was sent to those Bloomingdale's and other employees who did not timely return an opt-out form during the initial rollout (approximately 90 percent of Federated's 112,000 employees). Included in the mailing were another brief message about the program from Federated's CEO, a "By the numbers" newsletter and "We've got you covered" brochure summarizing the program and how well it had worked during the past year, and another election form that employees had to complete and mail to the SIS office, postmarked by November 15, 2004, in order to opt out of the arbitration provisions. The 20-page plan document itself was not again included in the mailing, but the newsletter, brochure, and election form stated that it could be found on the SIS website or received by mail on request. (R. Exh. 4; Tr. 94, 108-116, 150.)

As indicated above, following the 2005 merger, the former May Department Store employees were likewise given two opportunities to opt out. The first time in late 2006, the employees were notified in much the same way as Federated's employees in 2003. They were given a brief letter from Federated's CEO introducing them to the SIS program, accompanied by a 12-page brochure or booklet. They were also shown the video and a poster was displayed. In addition, the 2007 plan document that would cover them was mailed to their homes, along with an election form that the employees had to complete and mail to the SIS office, postmarked no later than October 31, 2006, to opt out. (R. Exh. 5; Tr. 119-121.) The second time, in late 2007, a "Program update" and "We've got you covered" brochure was mailed to them, along with another election form that they had to complete and mail to the SIS office, postmarked by November 15, 2007, to opt out. The 17-page plan document itself was not sent to them again, but the program update and election form stated that it could be found on the SIS website or received by mail on request. (R. Exh. 6; Tr.

² There is no contention in this proceeding that the rules and procedures governing the selection of the arbitrator or the conduct of the arbitration hearing are substantively unfair.

³ According to the uncontradicted testimony of the Company's witnesses, a preaddressed return envelope was always provided to employees with the election form. However, contrary to the Company's posthearing brief, there is no record evidence that the envelopes included prepaid postage.

123–124.)

As for new hires, in 2005, when Johnmohammadi was hired, the employment application form itself stated:

Solutions InSTORE. Please note that if you are hired, you will be given thirty (30) days from your date of hire to decide if you want to participate in the fourth step of the Company's early dispute resolution program, Solutions InSTORE, which is final and binding arbitration. It is important that you read all the materials and ask any questions you have so that you are fully informed about what Solutions InSTORE has to offer.

Once hired, the new employees were also given (1) a copy of the employee handbook, which briefly described the SIS program and advised them to "refer to your Solutions InStore booklet" for "further details" on the program; (2) a 12-page SIS brochure describing the program, which in turn referred employees to "the Plan Document" for "more specific details"; and (3) an election form that they had to complete and mail to the SIS office, postmarked no later than 30 days from their hire date, to opt out of the arbitration provisions.⁴ Although new employees were not given a copy of the 2004 SIS plan document, both the brochure (p. 11) and the election form stated that they could obtain a copy of it by logging onto the SIS website, requesting it from the local HR representative, sending an email to the SIS address, or calling the SIS office number. Finally, as indicated above, an SIS poster was also displayed at the stores. (Jt. Exhs. 1, 8A–E.)

Currently, new hires continue to receive a similar 12-page SIS brochure and election form. Unlike Johnmohammadi and other new hires in 2005, they are also given a hardcopy of the 2007 SIS plan document. Indeed, they are now required to execute an acknowledgement form stating that they have received a copy of both the brochure and plan document and understand that they have 30 days from hire to review the information and postmark the election form to the SIS office if they wish to be excluded from step 4. (Jt. Exh. 7; R. Exh. 7; Tr. 155–156.)

Of all the above-described past and current materials referencing the SIS program, only the 2004 and 2007 plan documents mention *both* the exclusion of claims under the NLRA *and* the ban on class actions at step 4. Several of the brochures or booklets briefly indicate that class actions are not available at step 4.⁵ However, none mention the exclusion for ULP alle-

gations. Indeed, they state that "any kind of dispute that could be heard in a court of law," including "wrongful" or "improper" terminations, are covered by steps 3 and 4, and that, unless an employee opts out of step 4, he/she agrees to use arbitration "as the sole and exclusive means to resolving any dispute" regarding employment. And the election forms, posters, video, employee handbook, Johnmohammadi's application, and current acknowledgment form, do not mention either. In fact, similar to the brochures/booklets, the current acknowledgment form states, "if at any time I have a dispute or claim relating to my employment, it will be resolved using the Solutions InStore process described in the brochure and Plan Document."

Finally, the record indicates that relatively few employees have actually returned an election/opt-out form. As indicated above, only 10 percent of Federated's employees returned the form following the initial rollout in late 2003. And only 3 percent returned the form at the second opportunity a year later. Similarly, only 2 percent of May Department Store employees returned the form at the first opportunity in 2006 following the merger, and only 1 percent at the second opportunity in 2007. As for Bloomingdale's itself, only 3 percent of its approximately 10,000 current employees (including former Federated and May employees and new hires) have returned the election/opt-out form. (Tr. 66–67, 108, 116, 122, 125.)

Analysis

I. THE EXCLUSION OF NLRA CLAIMS

As indicated above, this case is different from *Horton* in that the governing plan documents here specifically exclude claims under the NLRA from arbitration.⁶ However, this exclusion is not mentioned in any of the company brochures, booklets, or other documents summarizing or discussing the SIS program. On the contrary, both the brochures/booklets and the current acknowledgment form indicate that such claims are covered. Cf. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed. Appx. 527 (D.C. Cir. 2007) (unpub.) (statement in company memo that the arbitration policy applies to disputes that a "court of law" would be entitled to entertain could reasonably be construed by employees to include unfair labor practice allegations).⁷

In agreement with the General Counsel, I find that this conflict between the plan descriptions and the summary bro-

⁴ Although Johnmohammadi testified that she does not remember receiving the brochure and election form, I find that she was, in fact, given both.

⁵ See, for example, the chart on the last page of the 2004 "We've got you covered" brochure (R. Exh. 4). The chart, which appears under the heading "facts about arbitration," compares "arbitration" to "litigation" with respect to various factors, including the average length of time, company cost, and employee cost. With respect to "class actions," the chart says "No" under "arbitration," and "Yes" under "litigation"—without any further discussion or explanation. Thus, the chart suggests that class actions are never available or permitted in arbitration (even though this actually depends on the parties' arbitration agreement and intent, see *Oxford Health Plans LLC v. Sutter*, ___ S.Ct. ___, 2013 WL 2459522 (June 10, 2013)), and are always available or permitted in

litigation. Compare the more recent charts in the 2006 and 2007 brochures that were given or sent to the former May Department Store employees (R. Exhs. 5, 6), and in the current brochures given to new hires (R. Exh. 7). These charts more precisely say "Not Permitted" under "Step 4 arbitration," and under "Litigation (national perspective)," say "Permitted, but they require employees to prove that a class is proper under various legal tests."

⁶ As indicated above, the plan documents here also specifically state that nothing in the SIS program prohibits an employee from filing a charge or complaint with a government agency such as the EEOC; however, upon receipt of a right to sue letter or similar administrative determination, the employee's claim becomes subject to arbitration. But see *Horton*, 357 NLRB 2277, 2278 fn. 2 (finding similar language ambiguous).

⁷ See also the Supreme Court's recent discussion of such terms in *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 670 (2012).

chures/booklets and acknowledgment form creates an ambiguity that could reasonably lead employees to believe that their right to file unfair labor practice charges with the Board is prohibited or restricted. I further find, consistent with Board precedent, that the Company is properly held legally accountable for the ambiguity. See generally *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 3 (2012), and cases cited there. To paraphrase the Ninth Circuit in *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1145–1146 (2002), “the law should provide as strong an incentive as possible for employers to write [summary plan descriptions] so that they are consistent with [the governing plan] documents, a relatively simple task,” to avoid chilling the free exercise of employee rights. Unlike under the Employee Retirement Income Security Act (ERISA), there is no legal requirement under the Federal Arbitration Act (FAA) that employers provide employees with a summary plan description. Nevertheless, where employers do so, there is no apparent reason—and none is offered by the Company—why they should not be required to avoid inconsistencies, such as that here, that impact employee statutory rights. Indeed, to hold otherwise would encourage both ambiguity and brinkmanship, i.e., “conscious overstatements [the employer] has reason to believe will mislead [its] employees.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

This does not mean that simplicity, the very purpose of a summary,⁸ must be sacrificed completely to avoid violating the NLRA. At a minimum, however, mandatory arbitration plan summaries should clearly and consistently indicate that there are exceptions or exclusions, and direct employees to the governing plan document(s) to find them. Here, both the summary brochures/booklets (some of which are nearly as long and otherwise detailed as the plan documents themselves) and the acknowledgment form indicate, incorrectly, that there are no exceptions or exclusions, and only generally refer employees to the plan documents for more specific details of the SIS program. Cf. *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998) (employee was not contractually bound by mandatory arbitration clause in employee handbook where the acknowledgment form employee signed indicated that the handbook did not constitute a contract and did not specifically mention the arbitration clause).

Accordingly, I find that the Company has violated Section 8(a)(1) of the NLRA by maintaining and distributing to employees the overbroad SIS summary brochures/booklets and acknowledgment form, as alleged.

II. THE CLASS ACTION BAN

As indicated above, this case is also different from *Horton* in that the Bloomingdale’s mandatory arbitration provisions permit employees to opt out of arbitration altogether, and thereby preserve their right to pursue future claims in court on either an individual or collective/class basis. The Company argues that this is a significant difference because, as found by numerous Federal and State courts, it renders the SIS arbitration proce-

dure truly voluntary.⁹ The Company argues that this case therefore squarely presents “the more difficult question” that the Board in *Horton* expressly left open in footnote 28 of its decision:

[W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.¹⁰

The Company submits that this question must be answered in the affirmative, and that the SIS arbitration/opt-out provisions be found lawful, consistent with both the FAA, which “reflects an emphatic federal policy in favor of arbitration,” *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011), quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and the NLRA, which protects employee rights to engage in and “to refrain from” concerted activities, *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 3223, 324 (1974), quoting Section 7 of the NLRA, 29 U.S.C. § 157.¹¹

The General Counsel and Johnmohammadi, on the other hand, argue that the difference is of no legal significance. They argue that the opt-out opportunity does not render the SIS program truly “voluntary,” at least with respect to new hires, as it is only available within the initial 30 days of hire, a time when they are not likely to have any awareness of employment issues or their rights under the NLRA to engage in collective legal and other concerted activity. They further argue that the opt-out procedure places an unlawful burden on employees, both by

⁹ The Company’s posthearing brief cites numerous Federal and State court decisions finding employee assent in these circumstances, including *Quevedo v. Macy’s, Inc.*, 798 F.Supp.2d 1122 (C.D. Cal. 2011); *Outland v. Macy’s Dept. Stores*, 2013 WL 164419 (Cal. Ct. App. Jan. 16, 2013) (unpub.), and 13 additional, unpublished decisions involving the same Macy’s/ Bloomingdale’s SIS arbitration program involved here.

¹⁰ See also fn. 18 of the *Horton* decision, distinguishing *Webster v. Guillermo Perales*, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008) (unpub.).

¹¹ The Company additionally or alternatively argues that *Horton* was wrongly decided, noting that the Eighth Circuit and most lower courts have declined to follow it to date. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Miguel v. JPMorgan Chase Bank*, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012), and cases cited therein. See also *Walshour v. Chipio Windshield Repair, LLC*, ___ F.Supp.2d ___, 2013 WL 1932655 (N.D. Ga. Feb. 27, 2013) (finding *Horton* persuasive, but requiring the parties to proceed with individual arbitration anyway given the judicial trend upholding class waivers and the strong presumption in favor of arbitration). However, I am bound by Board precedent unless and until it is reversed by the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). The Company also challenges both *Horton* and the instant proceeding for lack of a valid Board quorum, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for certiorari granted, No. 12-1281 (June 24, 2013). However, the Company’s prehearing motion to dismiss the complaint on this ground was denied by the Board on April 30, 2013 (359 NLRB No. 113). Again, I am bound by the Board’s ruling.

⁸ *CIGNA Corp. v. Amara*, 131 S.Ct. 1866, 1877–1878 (2011). See also *CompuCredit*, 132 S.Ct. at 671–672.

requiring them to take affirmative steps to regain or preserve those rights, and by requiring them to do so openly—i.e., to “publicly self-identify” their unwillingness to go along with the Company’s preferred, nonjudicial and noncollective, dispute resolution procedure—at a “highly vulnerable time when they are new employees.” (GC Br. 15–16) (citing *Special Touch Home Care Services*, 357 NLRB 4, 9 (2011) (“a requirement of individual notice is . . . an impediment to Section 7 activity”), *affd.* on point but *enf. denied* on other grounds 708 F.3d 447 (2d Cir. 2013)).

Moreover, they argue that upholding the SIS opt-out procedure would be inconsistent with Board precedent finding unlawful and unenforceable employee separation agreements that waive or “trade away” the employee’s right to engage in future concerted activity. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), quoting *Mandel Security Bureau*, 202 NLRB 117, 119 (1973). As pointedly stated by Johnmohammadi, the “voluntariness of the waiver herein [is] irrelevant.” Rather,

the core issue is whether or not Bloomingdale's can buy, with any consideration, such as a raise, arbitration promise, a job, or a decent parking space in the employee parking lot, an employee's agreement not to engage, in the future, in concerted activity.

. . . .

Obviously, a voluntary agreement between an employer and an employee, wherein the employee agrees not to join a union in the future for \$1,000, would run afoul of the [Norris LaGuardia Act] and NLRA. There is no analytical reason to hold otherwise if, in exchange for the “benefits” of arbitration, instead of \$1,000, an employee agrees not to engage in the future in a concerted activity other than joining a union—agrees, for example, not to pursue concerted litigation, not to join with others in a judicial forum, or other forum to litigate wage claims [CP Br. 3, 25].

Having carefully considered the parties’ arguments and cited cases, in agreement with the Company, I find that the opt-out procedure is sufficient to render the individual arbitration program voluntary. While the Company’s overall SIS presentation has consistently been one-sided,¹² neither the General Counsel nor Johnmohammadi contend that the Company has failed to adequately notify employees about the class action ban. Further, at least some of the SIS brochures have encouraged employees to educate themselves about both “the benefits and limitations of arbitration,” and provided them with the website address of the American Arbitration Association to find more information. (See R. Exhs. 5 and 7.) Moreover, new hires have been given 30 days in which to do so, a not insubstantial or unjustifiable period of time. Cf. *California Saw & Knife Works*, 320 NLRB 224, 235 (1995) (generally approving of 30-day deadline for nonmember employees to object to, and thereby opt out of, paying fair-share union fees for noncollective bargaining activities); *reaffirmed* on point in *Auto Workers Local 376 (Colt's Mfg. Co.)*, 356 NLRB 1320, 1322 *fn.* 11

¹² See, e.g., *Quevedo*, 798 F.Supp.2d at 1136.

(2011), vacated as moot 487 Fed. Appx. 661 (2d Cir. 2012) (unpub.). To paraphrase the Seventh Circuit in *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1116 (7th Cir. 1996), cert. denied 117 S.Ct. 1426 (1997), “life is full of deadlines, and [there is] nothing particularly onerous about this one.” See also *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199–2000 (9th Cir. 2002) (mandatory arbitration agreement was not procedurally unconscionable because it only allowed employees to opt out during the first 30 days of employment). Finally, there is no allegation or record evidence that the Company has threatened employees with reprisals or retaliated against them for opting out. Cf. *Circuit City Stores v. Mantor*, 335 F.3d 1101 (9th Cir. 2003), cert. denied 124 S.Ct. 1169 (2004) (finding arbitration agreement procedurally unconscionable where the employer threatened employee’s job if he opted out).

I also reject the General Counsel’s and Johnmohammadi’s argument that the opt-out procedure unlawfully burdens employees. A one-time requirement that employees sign and post a preprinted election form, by regular mail in a preaddressed envelope, seems a minimal administrative burden, and no authority is cited holding otherwise. As for the possibility that new employees in particular would be reluctant to opt out due to fear of retaliation, this is certainly a reasonable concern given the Company’s clearly stated preference for arbitration.¹³ However, as indicated by the Company, the SIS mail-in procedure addresses this concern by having employees return the form remotely and impersonally to the corporate SIS office, rather than directly and personally to their immediate store supervisor or manager.¹⁴ Moreover, there would be no less reason for employees to fear retaliation with an opt-in procedure; either way the Company would know whether employees had elected “not to be covered by the benefits of arbitration.” Thus, if the General Counsel’s and Johnmohammadi’s argument were adopted, employers could never lawfully offer an arbitration agreement to an employee, no matter how beneficial or whether it covered one dispute or all disputes, that waived the employee’s right to pursue class litigation.

As for the General Counsel’s and Johnmohammadi’s argument that *Ishikawa* prohibits trading away Section 7 rights in this manner, if the answer were so simple the Board’s comment in *Horton* that voluntary agreements presented a “more difficult question” would have to be considered gratuitous. Certainly, the Board was well aware of its decision in *Ishikawa*; indeed, another case was pending before the Board at that time raising a similar issue. See *Goya Foods of Florida*, 358 NLRB 345 (2012) (citing *Ishikawa* in disapproving a settlement agreement in which the two alleged discriminatees each received over \$20,000 in exchange for, among other things, agreeing not to

¹³ See *id.* at 1137–1138.

¹⁴ The same concerns might be met by affording employees the even easier and faster option of making their election online, through the SIS website. Indeed, the Company has admittedly required new hires to sign the acknowledgement form online since 2007, using their social security number and other identifying information, “so that it could be more easily done and recorded” (Tr. 137–138). However, neither the General Counsel nor Johnmohammadi argue that the availability of such an alternative renders the mail-in requirement unduly burdensome. And I would not reach this conclusion on this record in any event.

engage in any union activity related to the employer's employees).¹⁵

What makes the issue here "more difficult" is that there is no "emphatic federal policy" in favor of employees getting severance pay, a raise, or a parking space. As indicated by the Company, there is, on the other hand, such a policy in favor of arbitrating disputes. In short, arbitration is not just any benefit; it is a federally favored and supported benefit. The question, therefore, is whether it is a benefit of such overriding Federal importance that the Board must or should look away when employees voluntarily enter into mandatory arbitration agreements, even if they are conditioned on employees completely and irrevocably relinquishing their right under the NLRA to engage in collective legal action against their employer.

The General Counsel and Johnmohammadi provide no real answer to this question. Rather, they simply recite the Board's reasoning in *Horton*, i.e., that concerted activity is a substantive right and the Supreme Court's opinions indicate that arbitration agreements may not require a party to forgo such rights. However, again, if the answer were so straightforward, there would be nothing "more difficult" about this case than *Horton*.

Moreover, as indicated above, there could be very real and adverse consequences, not only for existing arbitration agreements, but also for future agreements, if the position of the General Counsel and Johnmohammadi here were adopted. Thus, employers might no longer offer arbitration agreements to employees if they are unable thereby to avoid future class action litigation in court. This concern could be addressed by requiring only that such voluntary agreements permit employees to pursue class claims in arbitration. However, "the commercial stakes of class-action arbitration are comparable to those of class-action litigation." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S.Ct. 1758, 1776 (2010). Further, arbitration is "poorly suited" for class claims. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011). See also *American Express Co. v. Italian Colors Restaurant*, ___ S. Ct. ___, 2013 WL 3064410 (June 20, 2013). Thus, while small companies with only 20–25 employees might be willing to live with this alternative (see *Horton*, 357 NLRB 2277, 2285–2286, it is unlikely that large corporations with thousands of employees such as Bloomingdale's and its parent Macy's would be

(see *AT&T*, 131 S.Ct. at 1752).

Accordingly, for all the foregoing reasons, I find that the General Counsel has failed to carry the burden of proof and/or persuasion, and that the Company therefore did not violate Section 8(a)(1) of the NLRA by maintaining and enforcing against Johnmohammadi the individual arbitration provisions of the SIS plan.¹⁶

CONCLUSIONS OF LAW

1. By maintaining and distributing, since at least June 2011, summary descriptions of the Solutions InStore dispute resolution plan that would reasonably lead employees to believe that their right to file unfair labor practice charges with the Board had been eliminated or restricted, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the NLRA.

2. The Company has not otherwise violated Section 8(a)(1) of the NLRA by maintaining and enforcing against Charging Party Johnmohammadi the individual arbitration provisions of the Solutions InStore plan since June 2011.

REMEDY

The appropriate remedy for the violation found is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, the Company shall be required to rescind or revise the Solutions InStore summary brochures/booklets and acknowledgment form to be consistent with the governing SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and the right of employees to file charges with the Board. In addition, the Company shall be required to notify employees that this has been done and to also post a notice regarding the violation. Finally, because the SIS brochures/booklets and acknowledgment form containing the overbroad language are used on a corporatewide basis, the Company shall be required to take these actions at all of its stores where the SIS program is in effect. See *Horton*, 357 NLRB 2277, 2287; and *U-Haul of California*, 347 NLRB at 375 fn. 2.

Accordingly, based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent, Bloomingdale's, Inc., Sherman Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or distributing to current or new employees summary descriptions, including but not limited to brochures, booklets, or acknowledgment forms, regarding the Solutions InStore (SIS) dispute resolution plan, which would reasonably lead employees to believe that their right to file

¹⁵ Recent administrative law judge decisions relying on *Ishikawa* to invalidate similar arbitration/opt-out provisions are distinguishable. Each of the decisions also relied heavily on the fact that the arbitration policies expressly forbade employees who participated in arbitration (i.e., employees who had not opted out) from disclosing to other employees the existence, content, or results of any arbitration without the written consent of all parties. See *24 Hour Fitness USA, Inc.*, JD(SF)–51–12, 2012 WL 5495007 (Nov. 6, 2012), respondent's exceptions filed Jan. 3, 2013; and *Mastec Services*, JD(NY)–25–13, 2013 WL 2409181 (June 3, 2013). Although the SIS plan documents here also contain confidentiality provisions (R. Exh. 1, p. 14; R. Exh. 2, p. 13), which are arguably objectionable as well (see *Teimouri v. Macy's, Inc.*, 2013 WL 2006815 at *32–34 (Cal. App. May 14, 2013) (unpub.)), neither the General Counsel nor Johnmohammadi rely on this as support for finding the arbitration provisions unlawful. In any event, administrative law judge decisions (including this one) lack precedential authority unless and until reviewed and affirmed by the Board.

¹⁶ In light of this finding, it is unnecessary to address the Company's various affirmative defenses to these allegations.

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

unfair labor practice charges with the Board had been eliminated or restricted.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the SIS brochures/booklets and acknowledgment form to be consistent with the SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and the right of employees to file charges with the Board.

(b) Notify employees of the revisions or rescissions by providing them with a copy of the revised SIS brochures/booklets and acknowledgment form, or by specifically notifying them that the SIS brochures/booklets and acknowledgment form have been rescinded for the reasons set forth in this decision and order.

(c) Within 14 days after service by the Region, post at its facility in Sherman Oaks, California, and any other facility where the SIS brochures/booklets and acknowledgment form have been used, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 25, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated

Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or distribute summary descriptions, including but not limited to brochures, booklets, or acknowledgment forms, regarding our Solutions InStore (SIS) dispute resolution plan, which would reasonably lead you to believe that your right to file unfair labor practice charges with the Board had been eliminated or restricted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act (NLRA).

WE WILL rescind or revise the SIS brochures/booklets and acknowledgment form to be consistent with the SIS plan documents with respect to the exclusion of unfair labor practice allegations under the NLRA and your right to file charges with the Board.

WE WILL notify you of the revisions or rescissions by providing you with a copy of the revised SIS brochures/booklets and acknowledgment form, or by specifically notifying you that the SIS brochures/booklets and acknowledgement form have been rescinded for the reasons set forth in the Board's decision and order.

BLOOMINGDALE'S, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-071281 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."